

IN THE COURT OF APPEALS OF IOWA

No. 1-570 / 10-1383
Filed August 10, 2011

JOHN R. HEARN, Attorney,
Plaintiff,

vs.

**THE IOWA DISTRICT COURT
FOR MADISON COUNTY,**
Defendant.

Certiorari to the Iowa District Court for Madison County, William H. Joy,
Judge.

John Hearn seeks certiorari contending the district court acted illegally when it imposed sanctions upon him for inadequate discovery responses (1) in the absence of an allegation that the requesting party had made a good faith effort to resolve the discovery dispute before seeking an order compelling responses or (2) without first ordering compliance and warning that a failure to comply may result in the imposition of sanctions, as required by Iowa Rule of Civil Procedure 1.517. **WRIT SUSTAINED.**

John R. Hearn, Des Moines, pro se.

Patrick D. Smith of Bradshaw, Fowler, Proctor & Fairgrave, P.C., Des Moines, for Madison County.

Thomas D. Hanson and Kara L. McClure of Hanson, Bjork & Russell, L.L.P., Des Moines, and David L. Dorff of Environmental Law Division, Des Moines, for defendant.

Considered by Vogel, P.J., and Potterfield and Danilson, JJ.

POTTERFIELD, J.

The challenged sanctions against Madison County and its former attorney, John Hearn, included a \$1500 fine to be paid to the clerk of court with a ten-dollar per diem penalty for each day after forty-five days in which the fine remained unpaid, and a \$7500 judgment for opposing counsel's fees. Because the district court imposed sanctions in a manner not authorized by Iowa Rule of Civil Procedure 1.517, we sustain the writ.

I. Background Facts and Proceedings.

The underlying litigation began in 2006 when Madison County by its attorney Hearn filed suit against several individuals and entities, including Artistic Waste Services, Inc. (Artistic) alleging illegal dumping. What followed were the filing of numerous amended petitions and a multiplicity of discovery disputes. That underlying litigation continues.¹

On November 20, 2008, in ruling on the county's fifth motion to compel discovery, the district court noted

the defendants^[2] complained that during the past year to six months they had voluntarily provided a copy of approximately 50,000 documents to the plaintiff, which documents were contained in 15 boxes kept by defendants' counsel, and that much of the documents presently sought from them have already been produced. Unfortunately, neither plaintiff nor the defendants inventoried the documents voluntarily provided, which makes impossible a determination of what documents have and have not been provided to the plaintiff.

¹ Trial is currently set for October 2011.

² We use the terms plaintiff and defendants to refer to the parties and their role in the underlying litigation. We will refer to John Hearn, the plaintiff in this certiorari action, by his name and not as plaintiff.

The court thereafter individually addressed fourteen specific requests by the county and ordered the defendants to comply. The court then mandated:

The parties will be required to maintain and share with all parties a listing of each document. The list shall specifically identify each document so that it can be distinguished from all other documents of the same category, and the parties shall adopt a numbering system for each document, and each page of each document, equivalent to Bates Stamping, so that each document can be identified and easily retrieved, and the number of pages in the document confirmed.

(Emphasis added.)

Fast forwarding about ten months, two more motions to compel by the county and two motions to compel by defendants, as well as at least one motion for sanctions filed by the county, we arrive at Artistic's motion to compel discovery responses from the county filed September 10, 2009. In this motion related to its July 7, 2009 "First Request for Production of Documents" and "First Set of Interrogatories," Artistic asserted the county's responses were due within thirty days and

[o]n August 26, 2009, some fifty days after service Defendants' counsel wrote to all of Plaintiff's counsel requesting a response from Plaintiff on the discovery, as well as requesting other documents ordered by the Court. The letter was written in compliance with Rule 1.517(5) of the Iowa Rules of Civil Procedure. (See Exhibit C)

The August 26, 2009 letter, which was attached to the motion, reads in part, "Please consider this letter Phoenix's good faith effort to resolve these issues pursuant to Rule 1.517(5) of the Iowa Rules of Civil Procedure." Phoenix C&D Recycling, Inc. was another of the named defendants in the underlying litigation.

Artistic's motion to compel also noted it had received some promised documents; it had allowed the county until September 4, 2009 to respond; and on

September 5, it had received the county's motion to enlarge time to respond to discovery. Artistic asked that the court order the county to respond within five days of an order compelling response. A hearing was held on September 11, 2009, in which the court addressed the status of defendants' compliance with an earlier discovery order, the county's motion to enlarge time, and Artistic's motion to compel. The county did not object to the order compelling discovery on the ground that Artistic had failed to allege a good faith effort to resolve the problem without court intervention.

On September 15, 2009, the court filed a written ruling granting the motion to enlarge time and Artistic's motion to compel, stating the county "shall fully comply with the defendants' outstanding discovery on or before September 16, 2009." The order did not include a warning that a failure to comply with the order may result in the imposition of sanctions.

Artistic received discovery responses on September 17, 2009, but was not satisfied with the county's responses. So on October 8, 2009, Artistic filed a motion for sanctions regarding the county's answers to interrogatories in which it set out its interrogatories and the responses received. Artistic then suggested to the court a range of discovery sanctions, including: precluding the county from providing evidentiary support to certain of its claims; striking those claims; "holding [the county] in contempt for violating the rules of discovery and this Court's September 15, 2009, Ruling and Order"; directing the county to pay for its attorney fees caused by the county's "failure to fully comply with outstanding discovery"; and "as Defendants have done in this lawsuit, an Order requiring [the

county] to complete a 'Certificate of Compliance' in the event the Court does not enter an order striking" the claims.

In a separate motion for sanctions regarding the county's responses to its requests for production, Artistic specifically stated it was not asking for sanctions because the responses were submitted a day late; rather Artistic alleged the county "failed to bates-stamp the documents provided, as required by prior court order" and "failed to identify and label documents to correspond with the categories in the request." Artistic then provided further specifics as to its dissatisfaction with the responses and asked for the same remedies as in its other motion.

The county's resistance, in part, noted defendants "have doggedly fought discovery at every juncture" and that the county's recent request to extend time to respond was "met by a motion to compel discovery, ignoring [Iowa Rule of Civil Procedure] 1.517(5), which requires a good faith attempt to resolve discovery disputes prior to a discovery motion."

In response to Artistic's complaints about the document requests, the county stated (in part),

Defendant complains that Plaintiff failed to bates-stamp documents produced. Though all of Defendant's complaints could have been resolved by e-mail or phone call, the lack of bates-stamp and Defendants' claim that minutes or billings were incomplete were particularly susceptible to such resolution. (. . . Frankly, Plaintiff's counsel did not perceive the need for bates-stamp.) Plaintiff will bates-stamp documents.

After additional response, the county "request[ed] sanctions for Defendants' ill-conceived motions."

On January 14, 2010, the district court reviewed the motions for sanctions, and without a hearing, entered a ruling and order. The court began with this lament:

Unfortunately, discovery in this case has consumed pounds of paper, considerable hours of counsels' valuable time, and has produced more enmity, distrust, and palpable hatred between opposing counsel than the production of actual discoverable evidence. The court has unsuccessfully attempted to keep counsel focused on the end goal of these proceedings, but, once again, the next discovery dispute marches into the courtroom.

The court then found the county's responses to interrogatories "insufficient." As to the responses to requests for production, the court found them deficient, particularly as to the lack of Bates stamping. Here, the court stated,

With the past history of disputes concerning the completeness of documents exchanged between the parties, counsel's opinion [that he "did not perceive the need for bates-stamp"] was unexpected, especially in light of the court's November 19, 2008 Ruling

In conclusion, the court found "[s]anctions against the plaintiff would appear to be justified."

Because of the importance of the issue of discovery, the plaintiff should be allowed time to correct deficiencies and insufficiencies that exist in its discovery to Artistic, with Artistic granted the right to comment and object to what *will be plaintiff's last chance to comply* with its discovery obligation to Artistic regarding these Interrogatories and these Requests for Production.

(Emphasis added.)

The court therefore ordered the county to correct each deficiency, "completely redo its document production using Bates Stamping," and comply with the court's November 19, 2008 ruling prior to February 15, 2010. The court allowed Artistic to "comment and object prior to March 1, 2010 to plaintiff's

compliance with this ruling.” Further, the court set “a compliance/sanction hearing” for March 10, 2010.

At this hearing the court will hear argument from counsel concerning the *appropriate sanctions to impose on the plaintiff for its failure to properly make discovery as set forth in this ruling*. The hearing will also include a review of the plaintiff’s compliance with this ruling and whatever comment or objection, if any, of the defendant Artistic to the plaintiff’s compliance with this ruling. *In the event a lack of compliance with this ruling by the plaintiff is found to exist, the court will hear argument from counsel concerning the appropriate sanctions to impose on the plaintiff for the lack of compliance*. Sanctions can include, but are not limited to, an award of attorney fees, dismissal of one or more of the plaintiff’s claims, or dismissal of plaintiff’s petition for all of its claims.

(Emphasis added.)³

On January 21, 2010, the county served a motion addressing several matters and asking for an expediting hearing as Hearn was scheduled to undergo total knee placement surgery on January 25 and “[would] be unable to discharge professional responsibilities for at least one month.” A telephone hearing was held and the court continued “all deadlines,” including the February 15 deadline to fully comply with Artistic’s discovery. The deadlines were to be “reset at such time as Attorney Hearn is able to return to work.”

New counsel filed an appearance for the county on February 11, 2010.

On February 24, 2010, the county filed a “second motion for medical protective order” noting Hearn’s medical recovery time had been extended to March 26, 2010 (with an attached medical report). The county stated it “has now engaged additional counsel to assist in the case” and asked that the court

³ The first italicized sentence imposes sanctions for which no warning has been given. This second italicized sentence is the district court’s first warning of possible sanctions and relates to the new deadlines for supplementing deficient discovery responses.

continue the case to allow Hearn and new counsel to “coordinate case preparation.”

A telephone hearing was held on February 25, 2010. The district court ruled, “All deadlines and hearings scheduled from January 25, 2010 to and including March 23, 2010 should be continued, they [are] to be reset following the next telephone status hearing.

Hearn moved to withdraw as counsel due to medical reasons on March 22, 2010. He stated the county would not be prejudiced “as replacement counsel has appeared and is ready to prosecute this case.”

At a March 24, 2010 hearing, the county confirmed it did not object to Hearn’s withdrawal or the substitution of counsel. “The court indicated that it would grant Attorney Hearn’s motion after the hearing on discovery sanctions involving Attorney Hearn is held.” The court then ordered the county to correct its answers to interrogatories and request for production by April 14 and set the compliance/sanction hearing for April 28, 2010. The court stated it “intends to rule upon Attorney Hearn’s motion to withdraw following this hearing.” (The hearing was rescheduled to May 11, 2010 due to the illness of the presiding judge.)

At the May 11 hearing, the court asked Artistic if it wished to address the deficiencies of the county’s response to discovery. After counsel for Artistic commented about the merits of the litigation, the court stated:

The Court is concerned about the process and the fact that the process wasn’t followed and that has caused us time and delay and expense. An example is the fact that the Court early on realized that the informal sharing of documents between the Plaintiff and the Defendants wasn’t working very well. And so the

Court required Bates stamping. So that we wouldn't run into you two arguing about how many pages the other side gave you.

Bates stamping wasn't done when the Plaintiff responded to the request for production. And as a matter of fact, Plaintiff's Counsel said that he did not think it was necessary. That's a violation of the discovery rules in this case and something needs to be done to preserve the integrity of this process.

That was the Court's desire in hearing whether there's a recommendation on any sanction for the way the Plaintiff responded which required Defendants' Counsel to go through those answers and the production and draft the motions for sanctions and then the fact that we had to have a hearing on it and the fact that the Court had to rule on it.

And I don't care what the responses are and what the answers are so long as they're done. Certainly . . . after [new counsel] came on board, they hopefully complied with the Court's Order regarding the deficiency in this discovery. If that produced documents that are useful to you, that's fine. And if you don't want to ask for any sanction in regard to their process, we'll get to that. But we're going to first just try and preserve the process itself.

So we're going to first address the fact that the [county] decide not to Bates stamp documents it was providing even though the Court had previously ordered that.

Hearn was allowed to address the court, and then the court heard from Artistic's counsel that some seventy-two hours of attorney time was expended reviewing documents and drafting motions. In a post-hearing brief, Hearn reiterated that any imposition of sanctions would be contrary to the Iowa Rules of Civil Procedure and otherwise unjust as the orders did not specifically advise that sanctions could be imposed for a violation and the defendant made no certification of a good faith attempt to affect discovery without court involvement.

On May 25, 2010, the district court entered its ruling as to "sanctions for plaintiff's initial failure to make discovery." The court wrote,

At the May 11, 2010 hearing, Attorney Hearn's statements concerning bates-stamping and his position in his Post Hearing Brief did not lessen the seriousness of the failure of the plaintiff to comply with the bates-stamping requirement. A sanction of \$1500.00 should be ordered.

The court wrote further,

The substantial deficiencies and insufficiencies in the plaintiff's discovery to Artistic as chronicled by the court in its fourteen-page January 14, 2010 review of the plaintiff's responses to Artistic's interrogatories and requests for production clearly demonstrate an intentional disregard for the discovery obligation our rules of civil procedure impose upon every party to a lawsuit. Artistic's counsel opined that their attorneys fees . . . were in excess of \$11,500.00.

The court ordered an award of attorney fees to Artistic in the amount of \$7500.

The district court also ruled that the county, Hearn, and two other attorneys for the county were jointly and severally liable for the payment and

if they believe that some are more liable, one or more is solely liable, or one is solely liable for the sanction and award of attorney fees, that is a private matter for them to resolve, and is not a matter of this court's concern.

Madison County Attorney Julie Forsyth and the attorney for the county's liability insurance carrier, Patrick Smith, filed motions to enlarge findings, contending neither had been involved in the discovery responses and they had no notice they might be considered liable for possible sanctions. The district court found, "Counsel could have reasonably believed that the sanction hearing would only involve possible sanctions against their client, the [county]." The court determined a hearing should be set "for the purpose of allowing the [county] and each of [the county's] counsel and former counsel to present evidence to support the court amending its May 25, 2010 ruling on discovery sanctions."

After a July 30, 2010 hearing at which Hearn "did not challenge the representations of the other counsel that he was solely responsible for the discovery," the court amended its earlier sanction ruling to impose liability jointly

and severally on the county and Hearn only—not on the other members of the county attorney’s office or the attorney for the county’s liability insurance carrier.

In this certiorari action, Hearn challenges the sanctions imposed against him personally contending the district court imposed sanctions (1) without the requesting party indicating it had made a good faith effort to resolve the discovery dispute without court involvement, and (2) without the court first warning that a failure to comply may result in the imposition of sanctions, as required by Iowa Rule of Civil Procedure 1.517.

II. Standard of Review.

In a certiorari case, our review is for the correction of errors at law. *Johnson v. Iowa Dist. Ct.*, 756 N.W.2d 845, 847 (Iowa 2008). We examine only the jurisdiction of the district court and the legality of its actions. Iowa R. Civ. P. 1.1401; *Barnhill v. Iowa Dist. Ct.*, 765 N.W.2d 267, 272 (Iowa 2009). An illegality exists when the district court’s factual findings are not supported by substantial evidence or when the district court has not properly applied the law. *Judicial Branch v. Iowa Dist. Ct.*, ___ N.W.2d ___, ___ (Iowa 2011).

III. Discussion.

A. *No good faith allegation made.* Iowa Rule of Civil Procedure 1.517(1) provides that a party “may move for an order compelling discovery.” However,

[n]o motion relating to . . . discovery shall be filed with the clerk or considered by the court unless the motion alleges that counsel for the moving party has made a good faith effort but unsuccessful attempt to resolve the issues raised by the motion with opposing counsel without intervention of the court.

Iowa R. Civ. P. 1.517(5). Artistic's September 10, 2009 motion to compel does not contain such an allegation of good faith attempt.⁴ Without such an allegation, Artistic's motion to compel and later motions for sanctions should not have been considered by the district court.

Artistic claims that Hearn was informed of its good faith attempt to resolve the discovery dispute in an August 26, 2009 letter and this satisfies the rule. But informing opposing counsel is not what the rule requires. The plain language of rule 1.517(5) requires that a motion to compel discovery "allege[] that counsel for the moving party has made a good faith effort but unsuccessful attempt to resolve the issues raised by the motion with opposing counsel without intervention of the court." Artistic's motion states a letter was written and "[t]he letter was written in compliance with Rule 1.517(5) of the Iowa Rules of Civil Procedure." We are not convinced this is equivalent to informing the court that the movant has made a good faith effort but unsuccessful attempt to informally resolve the matter.

Secondly, even if we assume that the court must search the attached exhibit to find compliance with the rule, the letter itself does not contain a statement of Artistic's good faith effort. The letter reads, "Please consider this letter *Phoenix's* good faith effort to resolve these issues pursuant to Rule 1.517(5) of the Iowa Rules of Civil Procedure." Phoenix's efforts cannot support *Artistic's* duty to make a good faith effort to resolve the discovery dispute.

⁴ Indeed, one would be hard-pressed to find good faith efforts at informal resolution in this record.

However, since the county did not object to Artistic's motion to compel on this ground before it was granted, the trial judge did not have an opportunity to rule on the issue before granting the motion to compel. The county raised the issue for the first time in the hearings and briefs on the motions for sanctions.

B. The court's order granting Artistic's motion to compel does not contain a warning of possible sanctions. Rule 1.517(1) provides that "[a]ny order granting a motion made under this rule shall include a statement that a failure to comply with the order may result in the imposition of sanctions pursuant to rule 1.517." The court's September 15, 2009 order granting Artistic's motion to compel, did not include such a statement.

In the court's January 2010 ruling on the subsequent motion for sanctions, the district court's frustration with the ongoing discovery disputes is evident. The court observes it "has unsuccessfully attempted to keep counsel focused on the end goal of these proceedings, but, once again, the next discovery dispute marches into the courtroom." Although the January 2010 ruling warned of possible sanctions for failing to comply in the future, it also imposed sanctions for the discovery responses the court found inadequate, but for which no warning had been given. The expense in time and resources devoted to ongoing discovery disputes involving court intervention by all parties to this litigation is unacceptable. However, we cannot uphold the sanctions imposed here because they were imposed contrary to the requirements of rule 1.517.

WRIT SUSTAINED.